No. 13010

United States

Court of Appeals

for the Ninth Circuit

POTLATCH OIL AND REFINING COMPANY, a Corporation, and JEAN P. GERLOUGH, STANLEY H. HODGMAN, and ROY E. LARSON, as Trustees of that certain trust known as INLAND EMPIRE OIL AND GAS SYNDICATE, a common law trust,

APPELLANTS,

vs.

THE OHIO OIL COMPANY, a Corporation,

APPELLEE.

APPELLANTS' REPLY BRIEF

E. J. McCabe,
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Attorneys for Appellants.

Appeal from the United States District Court for the District of Montana.

SUBJECT INDEX

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

REVISED CODES OF MONTANA

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In presenting appellants' discussion of matters presented by appellee's brief we shall follow the order adopted by appellee and in referring to the parties we shall adopt the designations observed in appellants' brief first filed herein.

Admissibility of testimony to explain written agreements (Appellees' brief pp. 9-20).

The appellee's assertion that the language of the agreement as to what expenses are chargeable is clear and explicit emphasizes the words "all costs and expenses of developing and operating said lands for oil and gas purposes" but fails to place emphasis on the other equally important and pertinent clause which places a limitation on the words emphasized.

The only language expressing the expenses chargeable against Troy and its successors when properly read together conclusively establishes ambiguity and uncertainty and reads "all costs and expenses of developing and operating the land for oil and gas purposes" and in the same paragraph appear the words "but in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands." (R. 19, 20). The last clause clearly is a limitation of the extent of Troy's and its successor's liability.

It will be observed that the appellee's brief studiously avoids discussion as to the limitation clause on charges but addresses extended consideration to the

first clause with reference to cost and expenses of development and operation. (Brief 9-12, 17).

Examining the first clause in the light of the rule that "words of a contract as to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given them by usage, in which case the latter must be followed (Sec. 13-710, R.C.M. 1947) and it not appearing the parties used the language in a technical sense or that a special meaning is given to the words by usage then the question is what meaning would ordinary people attribute to such language? Can it be reasonably said that the ordinary person would understand same to mean expenses other than such as is directly connected with the developments and operations conducted on the land and would such ordinary person understand it to mean all indirect expenses however and wherever occurred which may be remotely traced to the operations on the land such as overhead expenses incurred away from the lands, traveling expenses of officers of the operating company incurred at other places, and other incidental expenses incurred away from the scene of the actual operation and development. We think not. We submit that the ordinary person would understand the language to mean reasonable expenses and costs incurred directly on the land being developed and operated. However the parties did not leave the term all costs and expenses alone for interpretation

but limited same by expressly providing Troy and its successors whould not in any case be held or charged beyond its interest in the production and equipment.

Appellee cites Luling Oil and Gas Co. v. Humble Oil and Refining Company 144 Tex. 445, 191 S. W. 2d. 716, at 725 as holding overhead and district expenses are legitimate expenses, chargeable to appellants. Analysis of the cited case will disclose that its decision is not pertinent to the question here involved. The language of the agreement in the cited case is much broader than the language in the present agreement. In the cited case the agreement with reference to charges to be made against the joint accounts provided (191 S.W. 2d. at pp. 724) as follows:

> ' "No home office or overhead charge shall be made to the joint account in connection with the operation of said premises; but to cover bookkeeping, accounting and office expenses generally a charge on each well, while actually drilling, of $50.00 per month and a charge of $25.00 per month on each producing well shall be made to the joint account, and to cover supervision and all other general and division overhead expenses a charge of $25.00 per well on each producing well and $50.00 per month on each drilling well shall also be made to the joint account."
> "All expenses of drilling, developing, operating and equipping said property after the completion of the first well, as well as expenses of drilling, handling and marketing the oil and gas produced therefrom shall be charged to the joint account." '

Further there was no clause in the Luling contract

reading "but in no case" was Luling to be "finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands." It is significant, however, that Luling and Humble, operating oil companies, recognized in the agreement the distinction between "office or overhead charge" to cover bookkeeping accounting and office expense generally; "supervision and all other division and overhead expenses" and "All expenses of drilling, developing, operating and equipping said property after the completion of the first well, as well as expenses of drilling, handling and marketing the oil and gas." (191 S.W. 2d at pages 724,725). Ohio however, would have this Court believe there is no distinction and all such expenses are expenses of development and operating lands for oil and gas" and that costs incident to marketing the oil and gas are also included in expense of developing and operating the land for oil and gas notwithstanding the obvious distinction and proper classification respectively of such expenses.

Appellee's witness, A. M. Gee, by deposition in referring to the clause limiting charges in answer to interrogatory No. 21 of his deposition (R. 561, 562, 587) said:

> "No, sir. By that clause it was definitely understood and agreed between those parties that it meant that The Ohio Oil Company, as the operator and the one required to advance all the funds necessary to develop and operate the jointly owned leases, would have to look solely to the oil and gas

produced, saved and marketed from the leases themselves for reimbursement for all expenditures made by it, and that under no circumstances would the Troy-Sweetgrass ever have to pay Ohio anything if the proceeds derived from the production of oil and gas from the jointly owned leases were insufficient. That is all that this clause meant. It was so explained to Mr. Jones and neither Mr. Hurley nor myself told him that under that provision there would be nothing charged to Troy-Sweetgrass Oil Syndicate after the wells were put into operation, or anything to that effect."

Thus, Ohio itself found it necessary to introduce testimony of its witness A. M. Gee as to what was said and intended by the parties when the agreement was being prepared to support its interpretation of this clause thereby demonstrating that Ohio impliedly concedes the clause renders the agreement on the question of chargeable expenses uncertain as to its meaning.

Defendant's contention that paragraph III authorizes direct and indirect charges irrespective of where incurred reduces the interpretation to absurdity as it would justify a portion of charges for office buildings and equipment at Casper, Wyoming, its division headquarters, part of payroll of office employees, traveling expenses of personnel, and could justify refinery costs and expenses and other expenses to no end as being part of necessary indirect expenses connected with the performance of the written agreement. The Montana statutes cited by Ohio in its brief at pages 12, 13 sustain appellants

contention in that the present agreement is not self interpreting and resort to extrinsic evidence is necessary as defendant has demonstrated by its reliance on the oral testimony of A. M. Gee, quoted and discussed above.

The Montana decisions cited by Ohio (brief pp. 13-17 incl.) excepting Brown v. Homestake Exploration Corporation, all related to written contracts which were self interpreting. With the view of saving the court unnecessary extended reading of the cases cited, we submit brief analyses of the cited cases.

Frank et al v. Butte and Boulder Mining & Lumber Co., 48 Mont. 83, 135 Pac. 904, was to recover money which by written agreement and was to be repaid out of net earnings of a corporation. The Court held the mode of payment being expressly provided and there being no net earnings, the action would not lie.

Bullard v. Smith, 28 Mont. 387, 72 Pac. 761, was an action on a promissory note. Oral testimony tending to vary its terms was rejected.

Union etc. Insurance Co. v. Jensen, 74 Mont. 70, 237 Pac. 518, was ejectment action to recover property under a clause in a mortgage expressly giving mortgager right of possession upon default by mortgagee. Ejectment adjudged.

Emerson Brantingham etc. Co. v. Raugstead 65 Mont. 297, 211 Pac. 305, was action to recover against guarantor of payment for property sold a third party. The Court considered evidence of what was said and

done by the parties as explaining the intent.

Hinerman v. Baldwin, 67 Mont. 417, 211 Pac. 1103, was an action to cancel an oil and gas lease for mistake because the lessor did not know what the word "royalty" meant. Court denied relief on the ground that the word "royalty" meant a share of the product or profit from the operation of lands for oil and gas.

Lisoski v. Anderson, 112 Mont. 112, 112 Pac. (2) 1055 is an action to recover damages. The plaintiff had given a full and complete written release and satisfaction to a joint tortfeasor of defendant which expressly released such joint tortfeasor and "all other persons, firms, and corporations from all claims, demands, action or causes of action" arising out of the accident whether "known and unknown, suspected and unsuspected." The court denied plaintiff, Lisoski, relief on the ground that when he released one tortfeasor without reserving action against the other tortfeasor expressly in the written release, all tortfeasors were released.

Armington v. Stelle, 27 Mont. 13, 69 Pac. 115, was brought to recover possession of a mining claim. The claim was leased by written lease specifying the term of possession. The Court granted the relief sought and denied the defendant permission to show an oral agreement that the lessor promised to give him an extension of the lease upon its termination.

In Rowe v. Emerson-Brantingham I. Co., 61 Mont. 73, 201 Pac. 316, the Court held that where written agreement warranted a threshing machine "will"

do the work as good as any other machine manufactured for like purpose the oral testimony of the purchaser as to an oral statement the machine would clean and thresh alfalfa seed as good as any other machine was inadmissible as varying the terms of the written agreement.

Wheeler v. James, 70 Mont. 37, 223 Pac. 900, holds that that where a building contract was clear as to the obligations and liabilities of the parties oral testimony of a custom that such a contract was not binding upon the parties until approved by the architect was inadmissible.

Hill Cattle Corp. v. Killorn, 79 Mont. 327, 256 Pac. 497, in an action for accounting involving the construction of an employment (ranching) contract the Court allowed certain limited expenses to be chargeable against defendant as expressly restricted by the contract notwithstanding the general provision appearing for all charges of "operating expenses." In brief, the Court recognized that a general all embracive clause for expenses chargeable was to be limited by a subsequent special restrictive expense clause.

Sanford v. Gates Townsend Co., 21 Mont. 277, 53 Pac. 749, was an action to recover personal property involving a written agreement. The defense was fraudulent representations inducing the making of the agreement. The Court held that the oral representations did not induce the defendant's sign-

ing of the written agreement. (Judge Pemberton dissented).

In Arnold v. Fraser, 43 Mont. 540, 117 Pac. 1064, an action to cancel a written agreement for sale of land payable as expressly provided for in the writing, the Court held evidence of an oral agreement made at the time that plaintiff would permit defendant to sell parts of the property at not less than $100.00 an acre and apply the proceeds on purchase price was inadmissible as varying the written agreement.

The cited case of Pitcairn v. Phillip Hiss Company, 125 Fed. 110, involved writings for the repair and decoration of a house at specified prices. Oral testimony of defendant husband was offered on behalf of defendant wife that it was orally agreed that as a condition of payment the work must be done to the satisfaction of the wife. The testimony was rejected as varying the express terms of the written agreement.

The case of Crawford v. Pierse, 56 Mont. 371, 185 Pac. 315, involved a written agreement supplement to a prior agreement for sale of lands, which supplemental agreement expressly recited it was being made for the purpose of granting the buyer additional time in which to make payments. The Court held that such language precluded the idea that there was any other purpose.

Webber v. Killorn, 66 Mont. 130, 212 Pac. 852, involved a written contract for the sale of lands and

buildings mentioned in the writing but were also covered by an oral agreement for the sale of the same buildings on certain terms which oral agreement had been fully performed. The Court held that evidence of the executed oral agreement was admissible in the action involving the written agreement for the sale of the lands under the rule that a written agreement may be modified by an executed oral agreement.

New Home Sewing Machine Co. v. Songer et al, 91 Mont. 127, 7 Pac. (2) 238, cited at bottom of page 24 of Ohio's brief, supports plaintiffs' contentions. Action was to recover on writings embracing sale of sewing machines. The plaintiff introduced at the trial a written order for twenty sewing machines which contained the printed provisions as follows:

> "Terms—net 60 days 2% Cash Discount in 30 days from date of invoice, F.O.B. shipping point. If further time is desired we (or I) agree to give note or notes with accompanying order or upon receipt of invoice. $.....Due....., with interest at 6% per annum, 60 days from date of shipment, 'following which is written "Finance Plan.'"

The order also contained this printed provision:

> "'It is understood that no conditions agreed to by any salesman or agent and not embodied herein will be in any way binding on the New Home Sewing Machine Company, and it is understood and agreed that the New Home Sewing Machine Company shall not be in any way liable under any separate or collateral agreement made between the undersigned and its salesmen.'"

Plaintiff also introduced a writing signed by one Johnson as a salesman for plaintiff reading "We are

prepared to finance your deferred payment lease contracts through the purchase from you of contracts as are acceptable." The evidence offered by defendants and received over objection by the trial Court related to an oral agreement made between the defendants and plaintiff's salesman, Johnson, his conduct in selling machines at retail, giving instructions in the art of dressmaking, collecting down payments, taking old machines in exchange which he hold, retaining the proceeds, and certain correspondence between plaintiff and defendant. Plaintiff on appeal contended the words "finance plan" interpreted themselves and left no room for construction nor introduction of evidence explanatory of the circumstances under which the agreement was made. The Court said (91 Mont. pp. 132, 133):

> "While it is true that the term "finance plan" is in general use, we are not prepared to say that it has any well-defined or fixed meaning. It is a matter of common knowledge that the finance plans employed in the business world in the distribution and disposal of merchandise are varied, and that the use of the term by one concern would mean one thing, and when used by another would denote something entirely different.
>
> "The meaning of the term used is not so free from doubt that it can be said as a matter of law that it furnishes its own interpretation. That the writing does not contain all the conditions of the agreement is apparent; resort must be had to extrinsic facts for an explanation of plaintiff's finance plan. The agreement is uncertain and ambiguous, and the court ruled correctly in admitting the evidence."

Applying the reasoning of the cited case to the present writing, the words "all costs and expenses of development and operating said lands for oil and gas purposes" followed by the later clause in the same paragraph that "in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands," presents an ambiguous agreement, and the testimony of Jones is admissible.

In Continental Oil Company vs. Bell, etc., 94 Mont. 123, 21 Pac. (2) 65, the action was to recover balance due under a written contract for sale of gasoline to a dealer which expressly fixed the sales price. The Court held that testimony of the defendant of an oral contract to refund a portion of the price was inadmissible as varying the express terms of the written contract of sale.

Ikovitch v. Silver Bow Motor Car Co. 117 Mont. 268, 157 Pac. (2) 785, involved an alleged conversion of an automobile by the vender's repossession under the written agreement by reason of purchaser's (plaintiff) default. The written contract expressly provided that all repairs to the automobile were to be made at the buyer's expense. The trial Court permitted the plaintiff to testify to an oral agreement to the effect that if the buyer made the repairs, the defendant seller would give buyer credit for the cost of the same. The majority opinion (J. J. Adair and Angstman dissenting) held the oral evidence was inadmissible to contradict the express writing

covering repairs and that the oral agreement was not an executed one and was not admissible.

In Bauer v. Munroe, 117 Mont. 306, 158 Pac. (2) 485, the question involved was whether evidence of an oral agreement was admissible to modify or cancel a written agreement for sale of land containing all of the terms of the sale. Held the oral agreement was still executed and could not modify the written agreement.

A reasonable construction to be placed upon the words "development" and "operation" in the light of the Jones testimony is that costs and expenses charageable to Troy is the expense of developing i.e., that is drilling and discovery of oil and gas and the expense of maintaining those wells in a state of production.

Guanacevi v. Com. Int. Revenue,
(C. C. A. 9th) 127 Fed. (2) 49, 51.

Carnegie Nat. Gas Co. v. South Penn Oil Co.,
(W. Va. C. A.) 49 S. E. 548.

Creech v. David,
140 So. 265 (C. A. La.)

STATUTES OF LIMITATION AND LACHES (pp. 23-26)

The appellee does not deny the principles of the cases cited in appellants' original brief on pages 55 to 76 but relies on Riley v. Blacker, 51 Mont. 364, 152 Pac. 758, (brief p. 23) and Luling Oil & Gas Co. v. Humble Oil & Refining Co. 144 Texas 445, 191 S. W. 2d 716 (pp. 24, 31-40) of brief. Riley v. Blacker is neither by analogy of fact or principle applicable.

In Riley v. Blacker there was no fiduciary relation between the parties, as here, no explanation for the delay was given, as here and the enforcement of the right under the facts in the cited case would have been inequitable. No inequitable result would follow enforcement of plaintiffs' rights in the present instance.

Ohio cites Wilcox v. Schissler, 55 Mont. 246, 175 P. 889, as excluding the testimony of Jones as to promises by McFadyen, agent and general manager of Ohio, that corrections would be made on a final accounting (brief p. 21, 22).

This case absolutely sustains the admissibility of Jones' testimony. The action was to foreclose a mortgage wherein the defendant claimed that the mortgage was obtained by fraud of plaintiff's deceased agent. Over objection the defendant was permitted to testify as to transactions with the deceased agent. The appellate Court approved the ruling of the trial court and held the exclusion of the statute may not by construction be extended to exclude persons not clearly falling within its express terms since the statute is an exception to section 7890 R.C.M. (section 10534 R.C.M., 1935, now sec. 93-701-2 R.C.M. 1947) which provides who are competent as witnesses. The Court held that the purpose of the legislature in enacting the statute was to declare a party dealing with an agent incompetent to testify as to any transaction or conversation with the agent in a suit against the principal **"the effect of which would be to render**

the principal liable by reason of the particular act or declaration of his agents." (emphasis supplied).

In this case Jones' testimony as to McFayden's promises of correction of all erroneous charges upon a final accounting to be rendered by Ohio is not offered or relied upon to render Ohio liable for an accounting, as such,, but is offered as one of the circumstances which with the fiduciary relation between Troy and its successors and Ohio and the other circumstances of the case as explaining the delay in filing suit. The liability of Ohio to account exists by virtue of the existing operating agreement which is signed.

Appellee cites a part of section 93-2716 R.C.M. on page 20 of brief as barring the promise of Manager McFadyen to Jones.

Mr. McFayden was **the general manager in charge of all business of Ohio in the Rocky Mountain area.** His acts and promises are the acts and promises of Ohio. Defendant does not deny he had authority to make the promise to Jones. His death was not laches of plaintiff (see authorities cited and consideration of this point, pages 66 to 71 appellants' brief heretofore filed).

Appellants make no claim of reliance upon the McFayden or Yealy promises as evidence of a new or continuing contract. Reliance is placed on the then and presently existing contract. Ohio's argument apparently is that plaintiffs should not have believed the representations of its managers that

it would correct any wrongs and errors and would perform its agreement. All we are asking is that it do perform its agreement.

The defendant overlooks the last sentence of the statute quoted which reads **"But this section does not alter the effect of any payment of principal or interest which payment is equivalent to a new promise in writing duly signed to pay the residue of the debt."** (Emphasis supplied). The statements (Exs. A, B, C, D, and E) received in evidence without objection disclosed a continuing indebtedness on the current account with payments made by Ohio thereon monthly, the last payment being made in February following its sale of its interest in January, 1943, to the Texas Co. The very statute cited defeats the defense of statute of limitations urged.

Luling Oil & Gas Co. v. Humble Oil and Refining Co. 144 Texas 445, 191 S.W. 2d 716 is quoted from at length by appellee on statute of limitations and accounts stated. See same case 192 S.W. 2d 315. An examination of this case discloses that the court held the contract involved did not constitute the parties joint adventurers or trustee and cestuis que trust. We submit that the controlling decisions, those from the Supreme Court of Montana cited and discussed at pages 58 and 69 of appellants first brief, establish that Montana would consider the parties as joint adventurers and under the express provisions of the Montana statutes cite dat page 63 of appellants' first brief, determine their relation also as a trusteeship. In the

same Texas case the agreement expressly provided that if exceptions to the monthly account were not made within forty-five days from the rendition "then such statement shall be conclusively considered as correct," and that the statute then commenced to run. However, the same case held and adjudged that as to incorrect charges in statements against which the statutory period had not run, recovery would be and was allowed to plaintiff. Hence under the rule of that case the learned Judge of the trial court in this action was in error when he adjudged appellants' action was barred by statute of limitations, presumably the eight year statute for commencement of actions based on a written agreement and dismissed the action.

The complaint in this action was filed below on March 18, 1947, and computing back eight years would render the action not barred as to erroneous charges made by Ohio after March 18, 1939, since Ohio continued to operate under the agreements until January 31, 1943, when it sold out to the Texas Company.

Furthermore in the Luling case no promise to rectify was made the other cases city by appellee on pages 27 to 31 do not support its contentions.

In McNab-Bell Oil Co. v. Commonwealth Oil & Gas Co., (Kans.) 52 Pac. (2) 363, two oil companies were jointly operating a lease, and pursuant to contract, monthly statements of account of expenses incurred by one company were rendered to its associate, the

debit balances of which were paid without objection every month until the termination of the contract. No objections of any kind to the monthly statements were made at any time. Upon completion of the contract the parties entered into a written settlement contract wherein one company acknowledged and paid its indebtedness to the other and thereunder one party assigned and transferred to the other party all of the leases involved, and each of the parties discharged and released the other party in writing from any claims growing out of the joint ownership and operation of the leases with certain excepted claims not pertinent to the present inquiry. Approximately three years thereafter one of the parties brought an action based upon certain alleged erroneous charges under the original agreement. The Court held that the retention of the monthly statements without any objection thereto by the plaintiff constituted an account stated. The Court (52 Pac. (2) page 36) refers to the fact that the alleged errors or mistakes were never called to the attention of the party rendering the statement, and again on page 36 the Court citing authorities held that the subsequent contract of settlement by the parties and the mutual release in writing constituted a settlement of their mutual business affairs and under the circumstances in view of want of objection made, the rule of account stated was applied. In the instant case the very facts lacking in the cited case, to-wit, objections to the correctness of account, are present; and in the present

case no written mutual accord or settlement agreement and mutual release of the parties was ever entered into.

Thomasma v. Carpenter, 175 Mich. 428, 141 N.W. 559, holds contrary to defendant's contention. The Michigan Court held that the doctrine of "account stated" does not apply to a special contract. The decision follows the rule of the California decision, Moore v. Bartholome Corporation (Calif. App.) 159 Pac. (2) 436, and Wisconsin case of Keith, Admr. v. Rust Land & Lumber Company, 167 N.W. 432 and of the late Oregon case of Halverson v. Blue Mountain Prune Growers Co-op. 214 Pac. (2) 986.

In O'Hanlon v. Jess, 58 Mont. 415, 193 Pac. 65, the itemized statement was never at anytime objected to.

Brown vs. Southern Grocery Co. 168 Ark. 547, 271 S.W. 342, held that the rendition of the statement setting forth items of debt and credit did not constitute an account stated, as such account must be balance rendered with the assent to it; that it was not shown that the account was intended as a final adjustment and settlement between the parties nor that there was an agreement express or implied that it should be so regarded.

Defendant quotes at length from Norum v. Ohio Oil Co., 83 Mont. 353, 272 Pac. 534. In the first place, no fiduciary relations existed between the parties in the Norum case, each party not sharing in the expenses and profits as in the present case. The cited

case involved royalty payable under the ordinary oil and gas lease. The decision is impertinent to the present situation; in fact, the decision rested upon the fact that the erroneous items of taxes paid were never objected to by the plaintiff, Norum. In the present case, objections to erroneous charges were repeatedly made.

The judgment below should be reversed and an accounting ordered.

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